

**GAE Committee
Public Hearing
March 6, 2017**

**TESTIMONY OF SECRETARY OF THE STATE DENISE W.
MERRILL REGARDING:**

- H.B. No. 5529, AN ACT CONCERNING CENTRAL COUNTING OF ABSENTEE BALLOTS
- H.B. No. 7163, AN ACT CONCERNING THE CIRCULATION OF NOMINATING PETITIONS
- H.B. No. 7164, AN ACT CONCERNING ENDORSEMENTS OF TOWN COMMITTEE MEMBERS AND CLARIFYING RESIDENCY REQUIREMENTS FOR CERTAIN STATE OFFICE CANDIDATES
- H.B. No. 7165, AN ACT CONCERNING NOTICES AND PUBLIC INFORMATION
- Proposed H.J. No. 5, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO ALLOW EARLY VOTING
- Proposed H.J. No. 13, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO PERMIT EARLY VOTING
- Proposed H.J. No. 16, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO PERMIT NO-EXCUSE ABSENTEE VOTING
- Proposed H.J. No. 33, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO ALLOW VOTING BY MAIL
- Proposed H.J. No. 34, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION PERMITTING EARLY VOTING AND VOTING BY MAIL

- Proposed H.J. No. 36, **RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION PROVIDING FOR NO-EXCUSE ABSENTEE VOTING**
- Proposed H.J. No. 46, **RESOLUTION PROPOSING A STATE CONSTITUTIONAL AMENDMENT ALLOWING FOR NO-EXCUSE ABSENTEE VOTING**
- H.J. No. 95, **RESOLUTION PROPOSING A STATE CONSTITUTIONAL AMENDMENT TO PERMIT EARLY AND REGIONAL VOTING**
- H.J. No. 96, **RESOLUTION PROPOSING A STATE CONSTITUTIONAL AMENDMENT TO EXPAND THE USE OF ABSENTEE BALLOTS**
- S.B. No. 897, **AN ACT CONCERNING ELIGIBILITY FOR ELECTORS TO VOTE BY ABSENTEE BALLOT**
- S.B. No. 898, **AN ACT CONCERNING MODIFICATIONS AND REVISIONS TO ELECTION ADMINISTRATION LAWS**
- Proposed S.J. No. 26, **RESOLUTION PROPOSING A STATE CONSTITUTIONAL AMENDMENT ALLOWING FOR EARLY VOTING DURING STATE ELECTIONS**
- Proposed S.J. No. 27, **RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION ALLOWING FOR NO-EXCUSE IN-PERSON ABSENTEE VOTING**

Good morning Chairman Fox, Chairmen Winfield and McLachlan, Vice Chairs Frantz, Slossberg and Winkler and Ranking Member Devlin and members of the committee. My name is Denise Merrill and I am the Secretary of the State of Connecticut. I would like to address a number of bills before the committee.

I will start with those bills and resolutions that have been offered to expand either or both early voting and absentee balloting opportunities for Connecticut voters. From the outset I would just like to clarify that there are many proposals before the committee dealing with early voting and no excuse absentee ballots. I support them all in principle. However, in most cases I do not believe the specificity of administration—such as how many days for early voting, sites or additions like mail-in voting—belong in the Constitution. Rather we could address those in statute. That said, these proposals advance an important idea that will expand voting rights in our state. For that reason, I am in favor.

- Proposed H.J. No. 5, **RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO ALLOW EARLY VOTING**
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All of these proposals seek to give more flexibility to voters for when they could cast a ballot. It would also relieve the intense pressure on Election Day. I believe it must be the work of my office and our honorable lawmakers to make it easier for eligible citizens to cast a vote.

Giving voters some form of early voting in Connecticut would eliminate the pressures we still experience on Election Day. November 8, 2016 was no exception.

On Election Day 2016, Connecticut accomplished something that is truly noteworthy. Thanks to election modernizations facilitated by this committee, we saw a record number of people register and vote on Election Day.

That is precisely what we want to see in our democracy. However, our success came at a price. Many voters were forced to wait in long lines that threatened their ability to cast a ballot. If any problems were encountered with registrations—such as someone not being on the list or having an outdated address—these voters would have to wait on a separate line to avail themselves of Election Day Registration, which could take hours more. All of this put intense pressure on our hardworking elections officials. We served more than 1.5 million people on a single day, not including absentee ballots.

The vast majority of the problems we encountered on November 8, 2016, would have been avoided by giving voters the flexibility to cast their ballots in advance. This is certainly not a new idea: at least 37 states and DC enable qualified voters to cast a ballot in person before Election Day. The proportion of Americans who cast ballots in advance of Election Day has increased from less than 10 percent in the 1990s to more than a third today.

Numerous people called and e-mailed my office both leading up to Election Day and after asking a simple question: “Why not us?”

As many of you on this Committee know, that’s actually not such a simple question.

The **Connecticut State Constitution** requires that voters appear in person on Election Day. It also severely limits the reasons one can vote by absentee ballot. These are unusual provisions in a state constitution.

So a few years ago, we proposed a constitutional amendment that would have removed language in the state constitution that limits voting to one day. We never specifically proposed early voting because we wanted to leave the specifics to the legislature.

However, such abstract language only confused voters. It was hard to make a coherent case for a constitutional amendment that removes something without a positive proposal to put in its place.

Therefore I agree with the intent of the Resolutions seeking to remove these restrictions. We should revisit the issue with new language that removes the hurdle and specifically recommends early voting.

I express my support for many of the resolutions up today with a few caveats.

While I support the principle behind some of the language added to these resolutions, I have concerns with the level of specificity included. For example, the number of days for early voting or the permissibility of mail-in voting. Would all polling places be open or just a few? These questions could and should be answered in statute, where details of this sort belong, rather than the Constitution.

Resolution 95 puts bona fide resident in brackets, which I assume is a typo.

One question I would address up front is the potential cost associated with early voting. The answer is there may be an additional cost, although there is probably a corresponding decrease in the cost of Election Day itself. Perhaps we can manage any cost by limiting the number of early voting locations to highly accessible sites like libraries or town halls and see some balance overall, as some other states have done.

Connecticut could therefore keep early voting simple. Early voting dates could be limited to a few days before Election Day. Perhaps the Friday, Saturday and Sunday before Election Day to ensure that voters would have choices that won't conflict with religious observances. Locations could be based at facilities that will already be open, such as libraries.

Early voting will help people exercise their most fundamental right.

In my view that is money well spent.

- Proposed H.J. No. 16, **RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION TO PERMIT NO-EXCUSE ABSENTEE VOTING**
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In addition to early voting, our state Constitution has language that could present a barrier to would-be absentee voters. The resolutions propose that we amend the Constitution to remove language that limits absentee voting to reasons “of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity.”

I would reiterate my earlier comments that we can achieve clarity without proposing more specificity than belongs in the Constitution. Specific language should be placed in statute to allow for administration of absentee ballots. I believe House Joint Resolution 96 is the best at achieving the aims no excuse absentee ballots on behalf of the voter.

I would also point out that, should restrictions be lifted, we would have to streamline the current system of absentee ballot administration since there could be a substantial additional demand on the Clerks to process those ballots.

- **Senate Bill 897, AN ACT CONCERNING ELIGIBILITY FOR ELECTORS TO VOTE BY ABSENTEE BALLOT**

The biggest impediment to no excuse absentee voting exists in statute, which is something we can fix today. This bill accomplishes some of the same ends as the resolutions above to lift the restrictions on absentee balloting, but without the need to amend the state Constitution.

General Statutes Sec. 9-135 defines the voter’s absence from the district as “all the hours of voting.” That has been interpreted to mean that the voter must be absent from the jurisdiction on Election Day all hours that the polls are open—6 a.m. until 8 p.m.—in order to be a legitimate absentee voter. That is far too restrictive in my view.

By removing the words, “all the hours of voting” certain allowances can be made for voters who work long hours on Election Day or who have unpredictable schedules. If we simply make a statutory change to redefine what is meant by “absent on Election Day” we could at least allow some people for whom it is a burden to stand in line, potentially for a long time, because they would have to miss work or care for family or have other responsibilities. I think we owe it to voters to make this simple change that would help everyone vote more easily.

I support this bill.

- **H.B. No. 5529, AN ACT CONCERNING CENTRAL COUNTING OF ABSENTEE BALLOTS**

This bill proposes that absentee ballots cast at any election, primary or referendum in a municipality be counted at a central location unless the registrars of voters of such municipality agree to count such ballots at the respective polling places. Under current law, in order for

absentee ballots to be counted outside of a polling place, the registrars would file a notice with the clerk.

This bill is a reversal of current procedure.

There are some benefits to this idea—namely ballot security and a more efficient, streamlined process—however I do have some logistical concerns. My office recently purchased tabulators for central counting locations for towns that currently choose to have ballots counted in one place. If more towns join those that currently count centrally, more machines may be needed.

There are some issues that raised a red flag, namely the burden of notification, which moves from those that count at polling places to those that don't. We think there may be some ways to balance this burden.

My office will gladly work with the members of the committee to iron out whatever concerns we have.

- **House Bill 7163, AN ACT CONCERNING THE CIRCULATION OF NOMINATING PETITIONS**

This bill would enable out-of-state residents to circulate petitions on behalf of candidates seeking placement on the ballot as the nominee of a petitioning party. I support this bill.

Under Connecticut law, candidates may appear on the ballot as nominees of a “major party,” a “minor party” or as the nominee of a petitioning party. There are thresholds for each. For example, a major party is defined by its share of the whole number of votes cast for all candidates for Governor (20 percent) or having “a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list of the state.”

So-called minor parties face similar, albeit lesser, thresholds, namely that their candidates for office received “at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election.” (CGS Sec. 9-372(6)).

Candidates nominated by major and minor parties may be placed on election ballots without the prior approval of the Secretary of the State—in the latter's case—as long as the parties certify and file the candidates' nominations with the registrars of voters within a certain timeframe.

In the case of a candidate attempting to get on the ballot as the nominee of a petitioning party, the candidate must collect signatures from registered Connecticut voters. The number of signatures needed equals the lesser of either “one per cent of the votes cast for the same office or offices at the last-preceding election... or (2) seven thousand five hundred” (CGS Sec. 9-453d) or with procedures described by Connecticut Gen. Statute 9-380 in the case of newly created offices.

A person who collects these signatures is called a circulator, defined as “a United States citizen, at least eighteen years of age and a resident of a town in this state and shall not be on parole for conviction of a felony,” according to Connecticut Gen. Statute 9-453e.

The state faced litigation brought by the Libertarian Party. The Libertarian Party has qualified as a “minor party” for only a few public offices in the state and thus must rely on the petitioning process to gain access to the ballot.

The residency requirement has been challenged by Libertarians all over the country and several federal circuit courts of appeal held that these residency requirements violate first amendment rights of free association and free speech.

Last year, the federal district court granted a temporary restraining order to allow non-residents circulate Libertarian candidate petitions. Based on this, I would urge support for this bill to bring our statutes in line with the outcome of this court ruling.

- **H.B. No. 7164, AN ACT CONCERNING ENDORSEMENTS OF TOWN COMMITTEE MEMBERS AND CLARIFYING RESIDENCY REQUIREMENTS FOR CERTAIN STATE OFFICE CANDIDATES**

This bill accomplishes a number of different things, which I mostly support. For example, this bill would exempt candidates endorsed for election as town committee members from the requirement to sign the certification of such endorsement.

As we know, candidates for state and municipal office must sign a certificate of party endorsement under a recently enacted legislation. However, this has caused considerable inconvenience for the parties to gather the signatures of the thousands of local party officials in our state.

With respect to the clarification of residency requirements, I am not sure of the intent of the bill. It may clarify some inconsistencies in the law, however, I fear it could create inconsistencies with other statutes. We would gladly work with the committee on language.

- **H.B. No. 7165, AN ACT CONCERNING NOTICES AND PUBLIC INFORMATION**

We currently receive and share notices electronically, which helps us get announcements to the public faster and more efficiently. It also enables customers of state services to access this information more easily.

The previous process was outdated and labor-intensive, requiring requests to be received through a variety of means including email, fax and postal mail. Those announcements were then individually scanned and posted to the website.

Our new online portal, which is live now, enables agencies to directly input meeting notices on their own. Notices are uploaded and instantly viewable by the public. The notices are searchable

and sortable by agency or date. A digital map (like a Google map) is conveniently provided, and a QR code is offered so customers can download the event directly into a mobile calendar.

The Secretary of the State's office manages the vendor and approves passwords. It is a much more convenient method for state agencies to share information with the public. What we would request is that we clarify the change in procedure for agencies in statute. We hope you will support this bill.

- **S.B. No. 898, AN ACT CONCERNING MODIFICATIONS AND REVISIONS TO ELECTION ADMINISTRATION LAWS**

This is fairly large bill that proposes a number of different things so I would like to address many of them point by point.

At 9-4, it is proposed that the Secretary of the State's office make all directives public. My office agrees in concept with this proposal, however, it would require significant resources to build. In fact, currently paper reduction is a priority in my office as with a number of other state agencies. Now may be a good time to discuss a bonding proposal that would make this possible.

Subdivision (3) of subsection (a) of section 9-192a proposes giving the professional body of the registrars of voters control over some portion of training. I oppose this proposal. The Secretary of the State's office is in charge training.

Sec. 4. Subsection (b) of section 9-320f proposes adding a requirement that the selection process of polling sites to be audited must take place within 72 hours. This is simply not possible. In the days after an election, my office is busy reviewing moderator returns and calculating whether recounts will need to take place. Recounts are conducted within five business days (six if one of those days is a holiday). My office must remove those polling places subject to a recount from the random drawing and I can predict some confusion with these deadlines overlapping.

The audit also needs to be open to the public, which could create scheduling challenges if limited to 72 hours after an election. We could agree that the sites be chosen within 14 days after an election or primary, while machines are still locked down. There are currently no requirements to hold the random drawing within a certain period of time.

Section 5 would remove University of Connecticut's role in reviewing technology such as the electronic poll books. I oppose this.

Section 6 adds a requirement that all training and education for new technology be conducted no later than two months prior to an election/primary. If we look at 2016 as an illustrative example, this would simply not have been possible. We purchased ballot-marking devices for voters with disabilities that simply had to be delivered in order to ensure Connecticut was in compliance with federal law.

We recognize the timing was not ideal. However, it was necessary and it was successfully implemented.

- H.B. No. 5589, **AN ACT CONCERNING CAMPAIGN FINANCE REFORM**

This bill would enhance disclosure of sources of funds used for independent expenditures.

I support this bill.

We are at a critical point for our democracy. While we are witnessing increased participation, we also see rising cynicism in the electorate. There is a view—whether right or wrong—that the deck is stacked in favor of powerful interests against the will of the people. When we shield political action committees and other special interests from public view, it is hard to blame the average voter for feeling that they are not playing by the same sets of rules.

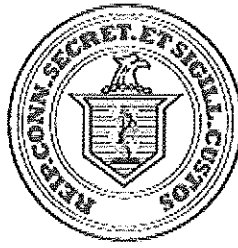
On this count, I really do believe that sunshine is the best disinfectant. Whatever we can do to make our political process more transparent is a good thing.

SUPPLEMENTAL BACKGROUND MATERIALS

Testimony of Denise W. Merrill

MARCH 6, 2017

- 1. FACTS ON EARLY VOTING AND ABSENTEE BALLOTS**
- 2. REQUESTED JFS LANGUAGE ON EARLY VOTING PROPOSALS
(3/3/17)**
- 3. ATTORNEY GENERAL OPINION (January 23, 2009)**
- 4. OLR Report- History and Constitutionality of Early Voting in
Connecticut (12/3/04)**



DENISE W. MERRILL

SECRETARY OF THE STATE
CONNECTICUT

Facts on Early Voting and Absentee Ballots

In October 2016, some experts predicted that more than 50 million voters would cast their ballots in some manner other than appearing at their polling place on Election Day.

In 2012, over 1/3 of voters -- more than 46 million people --- voted early. That total includes 23.3 million absentee ballots (military and civilian), 16.9 million voting early in-person, and 6.3 million who voting by mail.

In recent years, the total share of the electorate using early voting options has grown rapidly, by 2008 it was 1/3 of all voters. Absentee ballot voting began during the Civil War as a convenience for Union soldiers in the field. By the mid-20th century most states expanded the process for civilians.

In 1980 California became the first state to allow voters to use absentee ballots without providing an excuse. Today, 27 states and the District of Columbia allow no-excuse absentee ballots.

Connecticut is one of 20 states that still requires voters to provide an excuse in order to vote by absentee. However, unlike Connecticut, 7 of them have some other form of early voting option.

Early voting began with our nation's founders. Voting was held over several days so that rural voters would not be deterred by something like bad weather that made roads or rivers impassable.

Early voting has many benefits to the public:

- It alleviates long lines at polling places by creating other voting opportunities.
- It is wildly popular among voters. More and more people take advantage of the convenience of early voting with every election cycle.
- It influences candidate behaviors in a positive way. Candidates conduct voter mobilization efforts throughout the early voting period, which ultimately leads to increased voter contact and in turn increased voter turnout.
- The early voting process allows election administrators to "ease into" Election Day; troubleshoot problems and fix them without the constraints of a massive one-day event.

States that offer both early voting and no-excuse absentee ballots: New Hampshire, Maine, Vermont, New Jersey, Maryland, Ohio, Georgia, Florida, Wisconsin, Illinois, Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Montana, Wyoming, Idaho, California, Nevada, Arizona, New Mexico, Alaska, Hawaii, and Washington DC

States that offer early voting only: Texas, Louisiana, Arkansas, Tennessee, Indiana, West Virginia, and Massachusetts.



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DENISE W. MERRILL
Secretary of the State
SCOTT D. BATES
Deputy Secretary of the State

To: Representative Fox
Senator Winfield
Senator McLachlan
CC: Sue Debisschop, GAE Clerk
From: Shannon Wegele, Office of the Secretary of the State
Moriah Moriarty, Office of the Secretary of the State
Date: March 3, 2017
RE: Requested JFS language on Early Voting Proposals

We request the language below to be considered for substitute language for the constitutional amendment proposals. Please do not hesitate to reach out with any questions.

Option for Early Voting: Amend Article Sixth, Section 7 of the Constitution of the the State of Connecticut to permit no excuse absentee balloting.

Draft Language:

The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who [are unable to appear] do not appear at the polling place on the day of election [because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity].

RICHARD BLUMENTHAL
ATTORNEY GENERAL



55 Elm Street
P.O. Box 180
Hartford, CT 06141-0180

Office of The Attorney General
State of Connecticut

January 23, 2009

The Honorable Gayle Slossberg
The Honorable James F. Spallone
Co-chairs, Government Administration and Elections Committee
Legislative Office Building
Hartford, CT 06106-1591

*Changed to
informal opinion
because we can't
issue formal opinion
to these individuals.*

Dear Senator Slossberg and Representative Spallone:

You have asked for a formal legal opinion as to "whether the state constitution would need to be amended to permit electors the right to no excuse absentee balloting and/or in-person early voting by visiting a polling place or town office on or before Election Day." You note that media coverage of long lines and lengthy waits to vote in the historic election of Barack Obama as the 44th President of the United States has prompted legislative discussion of the possibility of permitting no-excuse early voting in Connecticut. You further note that 32 states presently allow no-excuse early voting; see <http://earlyvoting.net/states/abslaws.php>; but there is conflicting law on the constitutionality of such voting, and no Connecticut court has decided whether a state constitutional amendment is necessary to permit no-excuse early voting. See Sandra Norman-Eady, "History and Constitutionality of Early Voting in Connecticut," Office of Legislative Research (Dec. 3, 2004). Accordingly, you have asked for our opinion on the issue.

We conclude that an amendment to the state constitution would be required to permit no-excuse early voting in Connecticut. We further conclude that such an amendment would be consistent with federal laws designating a uniform election day, provided it did not permit early votes to decide a federal election prior to election day.

Fundamental rules of constitutional interpretation require that "effect must be given to every part of and each word in our constitution." Sheff v. O'Neill, 238 Conn. 1, 28 (1996)(bracket omitted). If the constitution requires that something must be done in a certain way, it carries with it an implied prohibition against doing that thing in any other way. Opinion of the Judges of the Supreme Court, 30 Conn. 591, 602 (1862)("in constitutions . . . an express and full direction to do a

particular thing in a particular way . . . carries with it an implied prohibition against doing the thing prescribed in any other way"); see also Starks v. University of Connecticut, 270 Conn. 1, 30 (2004) ("when statutes provide that an activity shall be performed in a certain manner, there ordinarily is an implied prohibition against performing that activity in a different fashion").

The Connecticut Supreme Court relied on these principles in construing the provisions of the State's 1818 constitution to determine whether an 1862 civil war statute permitting soldiers to vote out-of-state was constitutional. In analyzing the question, the Court explained that:

The constitution establishes an elective government, and under it there must of necessity be a fixed time, place and manner of holding elections. If these are clearly and sufficiently fixed and prescribed by the constitution, and nothing is expressly delegated or by implication left to the legislature, that body can not interfere to alter, extend or suspend them, or either of them, in the slightest particular. If they are not thus fixed and prescribed by the constitution, it is by implication incident to the general legislative power to do it, so that the government may be perpetuated and sustained.

Opinion of the Judges of the Supreme Court, 30 Conn. 591, 594 (1862).

Examining the text of the 1818 constitution, the Court opined that the statute permitting soldiers to vote out-of-state was unconstitutional because it conflicted with explicit constitutional provisions setting forth the time, place, and manner of holding elections. In particular, the Court noted that by permitting servicemen to give their ballots to their senior officers, the statute conflicted with the constitutional requirement that ballots be personally cast in "an elector's meeting." This was, in the Court's view, "a clear departure as to the *place* of receiving the votes" required by the constitution. *Id.* at 599 (*italics in original*). "Because the people saw fit, in their determined intention that all elections should be regulated by constitutional provisions, unalterable by the General Assembly, to prescribe in the clearest manner, when, where, and how the elective franchise should be exercised, . . . *these provisions must control the General Assembly in all exigencies until changed by the supreme will of the people, expressed in a new or*

amended constitution." *Id.* at 600-601 (emphasis added). Accordingly, the Court struck down the statute as unconstitutional.

In 1957, this Office relied on the Supreme Court's 1862 opinion in considering the constitutionality of proposed legislation that would have permitted absentee ballots, which were permitted under a 1939 amendment to the state constitution, to be counted *before* election day. *See* 30 Conn. Op. Atty Gen. 10 (January 10, 1957). The Attorney General concluded that the proposed legislation was unconstitutional, explaining that even though the constitution allowed absentee voting in certain circumstances, it was "apparent that the time and place for holding elections for State officers and members of the General Assembly are still fixed by the Constitution, and that the Constitution still requires all votes to be received, counted and declared on election day in the presence of the electors, and that lists of the votes so given, received, counted and declared be made and certified by the presiding officers of the electors' meeting." *Id.* at 12. The Attorney General reasoned that "[i]nasmuch as the votes of electors are required under the Constitution to be received and counted on election day, it follows that they cannot be received and counted on any other day." *Id.* at 12. Accordingly, the Attorney General concluded that an act permitting absentee ballots to be counted before the polls opened on election day would be unconstitutional.

The Maryland Court of Appeals applied a similar analysis in *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006), in which it struck down Maryland's early voting statute. The statute at issue in *Lamone* would have permitted voters to cast ballots outside of their residential ward during the week preceding election day. The Maryland court concluded that the statute was unconstitutional because the Maryland constitution required each voter to vote on election day in the ward where he or she resided and required the legislature to fine those who voted elsewhere. Although the constitution permitted those who were "absent" and "unable to vote personally" to cast absentee ballots, the court concluded that voters who cast ballots under the early voting statute were neither absent nor unable to vote personally. Instead, they were voters casting ballots in person early, which was not permissible under the Maryland constitution.

In contrast, in Kentucky, the state Attorney General concluded that no amendment to the Kentucky constitution was needed to permit early no-excuse voting because the Kentucky constitution permitted the legislature to select those categories of citizens who were authorized to vote by absentee ballot. *See* 2007

Ky AG Lexis 5 (August 20, 2007). Thus, the legislature could authorize no-excuse absentee voting by all citizens without violating the state constitution.

In Connecticut, our state constitution specifies a specific election day – the Tuesday after the first Monday of November (Conn. const. art. III, § 8, and art. IV, § 1) – and states that the presiding officers “shall” receive the votes “at” the election. Conn. const. art. III, § 9, and art. IV, § 4. The only limited exception is set forth in article sixth, § 7, entitled “absentee voting,” which states that:

The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town from which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity.

Thus, pursuant to article sixth, § 7, the only people who are permitted to vote in any manner other than appearing at a polling place on election day are those who are: (1) absent from the city or town in which they reside; (2) sick; (3) physically disabled; or (4) prohibited by their religion from engaging in secular activity on election day. Because “in constitutions . . . an express and full direction to do a particular thing in a particular way . . . carries with it an implied prohibition against doing the thing prescribed in any other way,” Opinion of the Judges of the Supreme Court, 30 Conn. 591, 602 (1862), we conclude that a no-excuse early voting statute, permitting individuals other than those listed in article sixth, § 7, to vote without appearing at polling places on election day, would violate the Connecticut constitution. Accordingly, to permit such voting, the General Assembly must amend the state constitution.

If the General Assembly chooses to amend the state constitution to permit no-excuse early voting, it must ensure that the amended provision does not conflict with federal election laws, including laws establishing the Tuesday after the first Monday in November as election day for federal congressional and presidential elections. See 2 U.S.C. §§ 1 and 7; 3 U.S.C. § 1.¹ In Foster v. Love,

¹ In establishing a uniform federal election day, Congress sought “to prevent States that voted early from unduly influencing those voting later, to combat fraud by minimizing the opportunity

522 U.S. 67 (1997), the U.S. Supreme Court made clear that federal law requires congressional elections to be decided on the Tuesday after the first Monday in November and not before that date. At issue in Foster was the validity of a Louisiana "open primary" law, under which all candidates for congressional office, regardless of party, appeared on the same ballot in an October primary. Any candidate who received a majority of the vote won the election without further action on election day. Only if no candidate received a majority was it necessary to hold a run-off election on election day. Because the result of the law was that the "final act of selection" of a candidate could be "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress" whenever a candidate received the majority vote in the open primary, the Court concluded that the law was in conflict with federal law requiring a uniform election day and therefore void.

Although Foster made clear that a state's early voting process may not result in congressional candidates being elected before the federal election day, several circuit courts have upheld state laws that permit early voting, but do not permit a winner to be chosen until election day arrives. See, e.g., Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773 (5th Cir.), cert. denied, 530 U.S. 1230 (2000); Voting Integrity Project, Inc. v. Keisling, 259 F.3d 1169 (9th Cir. 2001), cert. denied sub nom Decker v. Bradbury, 535 U.S. 986 (2002); Millsaps v. Thompson, 259 F.3d 535 (6th Cir. 2001).

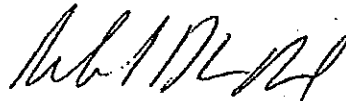
For example, in Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773 (5th Cir.), cert. denied, 530 U.S. 1230 (2000), the Fifth Circuit upheld a Texas statute that permitted anyone to vote in federal elections in Texas beginning seventeen days before the federal election day and continuing through election day. No election results would be released until the votes were tabulated on election day. In distinguishing Foster, the Fifth Circuit noted that Foster defined "election" as "the combined actions of voters and officials meant to make a final selection of an officeholder." Id. at 775, quoting Foster, 522 U.S. at 71. According to the court, Foster simply held that a federal election must not be "consummated" before election day. Id. at 775, citing Foster, 522 U.S. at 72. Because the Texas statute did not result in the final selection of office holders before election day, the court concluded that it did not conflict with federal law. Any other conclusion, the court noted, would invalidate absentee balloting statutes nationwide, which would be inconsistent with longstanding federal laws permitting absentee voting.

for voters to cast ballots in more than one election, and to remove the burden of voting in multiple elections in a single year." Millsaps v. Thompson, 259 F.3d 535, 541 (6th Cir. 2001).

After the Fifth Circuit upheld Texas' early voting law, the Sixth and Ninth Circuits applied similar reasoning and upheld early voting laws in Tennessee and Oregon respectively. The Tennessee law upheld in Millsaps v. Thompson, 259 F.3d 535 (6th Cir. 2001), permitted any registered voter to vote up to twenty days before the election, but required that the early votes not be counted until the polling places closed on election day. The Oregon law upheld in Voting Integrity Project, Inc. v. Keisling, 259 F.3d 1169 (9th Cir. 2001), cert. denied sub nom Decker v. Bradbury, 535 U.S. 986 (2002), permitted voters to vote on election day or by mail up to twenty days before election day. The court in each case found that because early voting continued through election day, and therefore was not "consummated" until election day, it did not conflict with federal laws designating a uniform election day.

Accordingly, we recommend that if the General Assembly amends the state constitution to permit early voting, whether in person or by mail, it adopt a system that would not permit the votes to be counted prior to the federal election day.

Very truly yours,



RICHARD BLUMENTHAL
ATTORNEY GENERAL

RB/JRR

Topic:

LEGISLATURES (GENERAL); VOTING; GOV. ADMINISTRATION & ELECTIONS COMMITTEE;
LEGISLATION; VOTING RIGHTS;

Location:

VOTING;



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2004-R-0906

HISTORY AND CONSTITUTIONALITY OF EARLY VOTING IN CONNECTICUT

By: Sandra Norman-Eady, Chief Attorney

You asked if the Connecticut General Assembly has considered early voting proposals in the past 10 years. If so, you wanted to know what happened to them. You also asked us to comment on the constitutionality of early voting legislation in Connecticut.

The Office of Legislative Research is not authorized to give legal opinions and this report should not be viewed as one.

SUMMARY

The Connecticut General Assembly has not considered legislation to allow early voting. We understand "early voting" to mean a process by which qualified electors can cast their ballots before Election Day without excuses like those required to vote by absentee ballot. However, resolutions proposing amendments to extend the state constitution's provision on absentee voting have been considered during this time frame. These proposals are important to note because no-excuse early voting by mail is really an extension of the absentee voting law to all people, regardless of their presence in the state, physical health, or religious beliefs on Election Day (i.e., the reasons currently allowed by the constitution for voting by absentee ballot). None of the resolutions were enacted for submission to the voters as required to amend the constitution. Two died after public hearing, one was never fully drafted, and the remaining two (both House Resolutions) died on the House calendar after receiving favorable reports from the Government Administration and Elections Committee (GAE). The 1997 proposal, H.J. Resolution 96, would have allowed all qualified voters to cast their ballot by mail, without appearing at a polling place. Additionally, one bill was introduced giving towns permission to allow voting on referendums entirely by mail. It died after the House referred it to the Legislative Management Committee.

Unlike the 31 states that currently allow early voting (see OLR Report 2004-R-0821), Connecticut's constitution fixes the qualifications of electors and the time, place, and manner for voting in this state in such a way that a constitutional amendment appears necessary to allow early voting in Connecticut. This apparent need for a constitutional amendment to allow early voting raises a question about the constitutionality of our current absentee voting statute.

EARLY OR ALTERNATIVE VOTING PROPOSALS

The Connecticut General Assembly has not considered legislation to allow early voting. However, during the past 10 years there were at least five attempts to alter voting procedures in Connecticut. All attempts, except one, were in the form of resolutions to amend the constitution instead of bills to amend state statutes and all five died. Table 1 shows each proposal by year and its disposition.

TABLE 1: METHODS OF VOTING PROPOSALS

<i>Resolution Summary</i>	<i>Disposition</i>
1993—HJR 67 Would have allowed the General Assembly to extend the use of absentee ballots	Favorably reported by GAE; adopted by the House; died on the Senate calendar
1997—HJR 96 Would have allowed the General Assembly to pass a law permitting voters to vote by mail	Died in the GAE Committee after a public hearing
1998—HJR 108 Would have allowed the General Assembly to pass a law permitting voters to vote by mail	Favorably reported by GAE; died on the House calendar
1998—HB 5689 Gave towns the option to allow votes on a referendum entirely by mail	Favorably reported by GAE; died in Legislative Management after referral from the House
2003—SJR 10 Would have allowed the General Assembly to extend the use of absentee ballots to all people age 70 and older	Died in GAE without a hearing

CONSTITUTIONALITY OF EARLY VOTING IN CONNECTICUT

As currently written, neither the state constitution nor state statutes gives voters the option to cast their ballot before Election Day by absentee ballot or visiting a polling place or town

office before that date and voting in person. No Connecticut court has decided whether a constitutional amendment is necessary to allow early, no-excuse voting. However, it appears that such an amendment is necessary.

Rules of Construction

In the analysis of issues arising for the first time under the state constitution, a court must consider, to the extent applicable, six factors: (1) the text of the constitutional provision, (2) related Connecticut precedents, (3) persuasive federal precedents, (4) persuasive precedents of other states' courts, (5) historical insights into the intent of the constitution, and (6) contemporary understandings of applicable economic and sociological norms (*State v. Glenn*, 47 Conn. App. 706 (1998)).

Analysis and Conclusion

As a general rule, state constitutions are viewed as "limitations on the otherwise plenary power of the people of each state to do as they will" (16 Am. Jur. 2d. § 40). "Whatever that supreme original will (constitution) prescribes, the General Assembly, and every officer or citizen to whom the mandate is addressed, must do; and whatever it prohibits, the General Assembly, and every officer and citizen, must refrain from doing; and if either attempt to do that which is prescribed, in any other manner than that prescribed, or to do in any manner that which is prohibited, their action is repugnant to that supreme and paramount law, and invalid" (*Opinion of the Judges of the Supreme Court as to Constitutionality of Soldiers' Voting Act*, 30 Conn. 591 (1862)).

The state constitution establishes an elective government, and under it there must of necessity be a fixed time, place, and manner of holding elections. It was the intention of the men who framed the constitution of this state, and of the people who adopted it, to place every thing pertaining to the election of state officers and members of the General Assembly beyond the reach of subsequent legislatures (*Opinion of the Judges of the Supreme Court, supra*). If these are clearly and sufficiently fixed and prescribed by the constitution, and nothing is expressly delegated or by implication left to the legislature, that body cannot interfere to alter, extend or suspend them, or either of them, in the slightest particular. If they are not thus fixed and prescribed by the constitution, it is by implication incident to the general legislative power to do it, so that the government may be perpetuated and sustained (*Pratt v. Allen*, 13 Conn. 119 (1831)).

Section Eight of Article Third provides for the election of members of the General Assembly on the Tuesday after the first Monday of November, biennially, in the even-numbered years. Section One of Article Fourth provides for the election of state officers on the Tuesday after the first Monday of November, quadrennially. Section Nine of Article Third provides that "at all elections for members of the general assembly the presiding officers in the several towns shall receive votes of the electors, and count and declare them in open meeting." Section Four of Article Fourth provides "at the meeting of the electors in the perspective towns held quadrennially...for the election of state officers, the presiding officers shall receive the votes and shall count and declare the same in the presence of the electors."

Given the general rule that the state constitution is a limitation on the otherwise exclusive power of the legislature to make laws, the General Assembly, with one exception, cannot pass a law that allows electors to cast their votes in any manner other than that stated above (i.e., in person on Election Day). The exception is contained in Section Seven of

Article Sixth, which authorizes the General Assembly to allow absentee voting under certain circumstances.

Article Sixth, Section Seven of the state constitution provides as follows:

The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity.

This conclusion appears to be supported by Connecticut precedents. In 1862, when there was no provision for absentee voting in the state constitution, the Supreme Court declared unconstitutional a statute allowing soldiers serving in the Civil War to vote by absentee ballot (*Opinion of the Judges of the Supreme Court, supra*). The people

responded in 1864 with an amendment to the constitution that allowed soldiers who volunteered or were drafted during the Civil War to vote by absentee ballot. This provision applied only to the election in 1864, after which the war ended and the amendment expired.

Additionally, although not binding on a state court, we also found a 1957 attorney general's opinion where then-Attorney General John Bracken, citing *Opinion of the Judges of the Supreme Court*, advised then-Secretary of the State Mildred Allen that legislation providing for the counting of absentee ballots before the opening of the polls on Election Day would violate the provisions of the state constitution. In this opinion, the attorney general stated "in reading the constitutional provision concerning absentee voting with the other provisions of the Constitution, it becomes apparent that absentee ballots cannot be cast at any other place, time or in any manner other than that provided by the constitution" (30 Op. Atty. Gen. 10 (January 10, 1957)).

Other examples in support of this conclusion are 1993 public hearing testimony by then-Secretary of the State Pauline Kezer and the position taken by the Legislative Commissioners' Office in 1987. In her testimony before the GAE Committee in support of HJR 67 (a proposal to extend the use of absentee ballots), Secretary of the State Kezer stated that it would make sense to take the reasons for voting by absentee ballot out of the constitution "especially if you want to end up in a situation where you want early voting later on or some other change in election law to allow more use of absentee ballots...." (GAE Public Hearing Transcript, March 8, 1993).

Finally, in 1987, the Legislative Commissioners' Office returned to the GAE Committee as unconstitutional a bill (HB 5768) that would have allowed electors to vote by absentee ballot if they work during all hours of voting. The commissioners stated "Section Seven of Article Sixth... provides that absentee voting may be provided for by law...only in the cases where

an elector is absent from the city or town...by reason of sickness, physical disability or religious tenets.... The Constitution makes no provision for the general assembly to provide for absentee voting where the elector is employed during all of the hours of voting."

STATUS OF CURRENT ABSENTEE VOTING STATUTE

The current statute on absentee voting provides that any person may vote by absentee ballot if:

1. he is absent from his city or town of residence during all hours of voting;
2. he is ill;
3. he is physically disabled;
4. the tenet of his religion forbid secular activity on the day of the primary, election or referendum;
5. he is in active service with the armed forces of the United States; or
6. he is an election or referendum official outside of his voting district and his duties will keep him away during all hours of voting (CGS § 9-135).

Although reasons one through four above for voting by absentee ballot are consistent with the power granted to the legislature by Section Seven of Article Sixth of the state constitution and reason five implies absence on Election Day, reason six appears to go beyond that grant of power. Given the analysis in this report, it appears that, if challenged, a court would find that reason for voting by absentee ballot unconstitutional.

SN-E:ts

